No. 3974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. EIKLAND and O. EIKLAND,
Plaintiffs in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN SHATTUCK,
Defendants in Error.

Upon Writ of Error to the District Court for Alaska, Division Number One.

J. H. COBB,
Attorney for Plaintiffs in Error.

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Statement of the Case.

On a former Writ of Error, a judgment in favor of defendants in error (also defendants in the court below) was reversed for misdirections to the jury. (266 Fed. 821.) A petition for certiorari was denied by the Supreme Court, and upon the coming down of the mandate, the case was again tried to a jury and resulted in a verdict and judgment for defendants. Upon the last trial there were no other or additional facts in evidence. Defendants introduced some other and additional witnesses, but their testimony was merely cumulative; the material and ultimate facts about which there was really little dispute, were the same on both trials. These facts are clearly, accurately, and sufficiently stated by this court, as follows:

"Action to recover damages for causing destruction of plaintiffs' property by flood waters. The de-

fendants Casey and others, owners of land bordering upon Gastineau Channel at the mouth of Gold Creek, in 1913 sold to the plaintiffs a lot. Gold Creek flows from the mountain range east of Juneau, in part through a canyon, out of which it flows near the boundary of the Casey-Shattuck land, and thence across such land into Gastineau Channel. Plaintiffs' lot was on the south side of the stream, and from the point where the stream emerges from the canyon to a point some distance below plaintiffs' lot the creek was confined by high banks, but a short distance below plaintiffs' lot the creek at times overflowed the banks and spread over part of the Casey-Shattuck lands, and allowed a free outlet of the waters to the channel.

"After the plaintiffs had built a house and improved their property, defendants built a dam or bulkhead across the creek at a point approximately opposite the plaintiffs' lot, and from the dam, and from a point opposite and across the stream, constructed bulkheads of logs and stone to Gastineau Channel at a point to the southeast, thus changing the course of the stream, and deflecting it to the southeast in a curve around the west and south sides of plaintiffs' lots. It was alleged that the channel thus constructed was sufficient to carry the water away at ordinary stages of the stream, but was wholly insufficient at times of flood, such as ordinarily occurred at times of heavy rains, so that the stream as dammed and changed in its course became a danger to plaintiffs' property of which defendants were fully advised. It was also averred that on September 26, 1918, there occurred one of the usual periodical heavy rains to which the vicinity was subject, and which caused the water of Gold Creek to rise and pour out of the canyon onto the Casey-Shat-

tuck lands, and that the waters, unable to flow across the flat in their usual and natural course, because of the dam, and being deflected thereby, and the new channel being insufficient to confine and carry off the water, the flood water was deflected, and impinged against plaintiffs' property, and washed it away, and washed the earth and soil upon the lot itself, so that a new and deep channel thereafter occupied the space formerly occupied by the lot and house; that the damage and destruction was caused solely by the construction of the dam and bulkheads.

"The answer affirmatively pleaded that the flood and rains of September 26th were unprecedented and extraordinary, and such as could not have been foreseen by the defendants or anyone else, and that the damage was due solely to an act of God. Issue was taken with these affirmative allegations. The case was tried to a jury, and verdict rendered for defendants.

"The evidence showed that the defendants constructed bulkheads across Gold Creek, and thus dammed the same and diverted it from its natural bed, and forced it into an artificial channel, that the original natural channel before diversion had a relative capacity larger than that of the artificial channel, and that the original channel on a cross-section measurement had an area of 230 square feet, while the new channel on a cross-section measurement had but 150 square feet." (266 Fed. 821.)

Errors assigned are to the refusal of the court to give certain instructions requested, and the giving of instructions which this court had held on a former hearing here, to be erroneous, and are as follows:

Assignments of Error.

I.

"The court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"Gentlemen of the Jury: When the defendants undertook to build the bulkhead and flume mentioned in the pleadings and evidence whereby they changed the course, and confined the waters of Gold Creek into a new channel, it was their duty to see that the new channel which they provided as substitute for the natural channel, is in all respects adequate to carry off the water brought down by an extraordinary rainfall. The evidence shows conclusively that the defendants failed to discharge this duty. The evidence further conclusively shows that the flood of September 26th, 1918, which destroyed plaintiffs' property was one which might reasonably have been anticipated; that plaintiffs' property was situated on high ground far above the reach of flood waters from Gold Creek; and that because of the construction of said flume and bulkheads in the manner and of the capacity they were, the flood waters were directed against the plaintiffs' property and caused the damages complained of. You are therefore instructed to return a verdict for the plaintiffs for the amount of the damages you find they have sustained under the instructions hereinafter given.

"In fixing the amount of your verdict you will ascertain the fair market value of the house and lot before the damage occurred, and the fair market value after such damages occurred and the difference would be the damages to the house and lot. In fixing the market value of the house and lot you should take into consideration the evidence as to the cost thereof, its condition of repair, and all other cir-

cumstances in evidence bearing upon that question. In addition to such sum as you may find for the damages to the house and lot, you will add the fair market value of the contents thereof which you find were destroyed, plus the damages, if any, to such part of the contents as you find were saved. The aggregate of these items should be the amount of your verdict."

II.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs' property was caused by an act of God, as that term is used in the law."

III.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If the building of the bulkheads and flume by the defendants caused the damage to the plaintiffs' property, then they are liable and you should find a verdict for the plaintiffs. Now of course, the flume and bulkheads standing alone of themselves could not cause any damages to the plaintiffs' property; but the flume and the bulkheads were built for the purpose of, and did change the course and confine the flow of the waters of Gold Creek, and if the bulkheads and flume so controlled and influenced the flow of the flood waters as to deflect the current against plaintiffs' lot and wash the soil and house away, then it was the bulkheads and flume which caused the damages. The question simply is this: Was the building of the flume and bulkheads by the defendants, in the manner and form disclosed by the evidence, a contributing factor without which the damage would not have occurred? If it was, the defendants are liable. In deciding this question, you should bear in

mind that it is admitted in the pleadings, and shown in the evidence, that prior to the building of the flume and bulkheads, when the stream was in its natural condition, plaintiffs' house and lot was far above the reach of all ordinary floods; that Gold Creek was subject to sudden rises and periods of flood and high water, and that the flood of September 26th, 1918, though higher than usual, was still only such high water as was to be anticipated and guarded against by defendants when they undertook to interfere with the natural channel and course of the stream."

IV.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If you find and believe from the evidence, that prior to the time the defendants built the cribbed channel and changed the course and confined the waters of Gold Creek therein, the waters of said creek then unconfined except by their natural banks, flowed past plaintiffs' lot, and in periods of high water spread out over the delta of the creek, finding and following the lowest natural channels to the sea, and this natural outlet through the channels and across the delta would have been sufficient to provide such an escape for the flood waters of September 26th, 1918, that said flood waters would not have undermined and washed out plaintiffs' property, but that because of the building of the cribbed or bulkheaded channel, the flood waters on September 26th, 1918, were prevented from escaping and flowing off, as freely as they otherwise would, either because of the blocking up of the cribbed channel, or because of its insufficient capacity, or both, and the flood waters were diverted from their natural channel, and the current driven against the plaintiff's property, thereby undermining it, and washing it away, you will find

for the plaintiffs for the damages they thereby suffered regardless of whether the flood of September 26th, 1918, was the highest ever known in the creek or not. To make the law on this point plain, you may ask yourselves this question: In the light of the evidence, if the bulkheaded and cribbed channel had never been built, and the stream left in its natural condition, would be the high water of September 26th, 1918, have damaged plaintiffs' property? If you find from a preponderance of the evidence that it would not, then I instruct you to find for the plaintiffs."

V.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"It is the duty of one who undertakes to change the course of a natural stream or to confine its waters in an artificial channel, to make such artificial channel of at least the size or capacity of the natural channel it is to replace, so as to fully carry off such flood waters as are likely to occur in the stream; and where the stream flows over or across a delta, and there are several channels across such delta, through which flood waters escape in time of floods, the artificial channel should be constructed of at least sufficient size to carry as much water as all the natural channels it was to replace; if he who builds the artificial channel fails to do this, he is guilty of negligence and is liable for all damages caused by such negligence."

VI.

The Court erred in refusing the prayer of the plaintiffs to instruct the jury as follows:

"If you find and believe from the evidence that on September 26th, 1918, timbers and logs washed out of the bulkheaded or cribbed channel built by defendants at a point approximately opposite the

upper end of plaintiffs' lot, and such timbers or logs lodged in the channel of the creek causing a dam or obstruction to the current; and that dam or obstruction threw the current over against the easterly bank, and cut and washed away the bank until it had eaten into and destroyed plaintiffs' property, then I instruct you to find for the plaintiffs."

VII.

The Court erred in instructing the jury as follows:

"Naturally two questions arise under the issues and admitted facts as I have detailed to you: The first is,—was the flume of such faulty construction, either in its flimsy character, as alleged by the plaintiffs, or in the manner of its construction, as alleged by the plaintiffs, that it caused or contributed to the destruction of the property of the plaintiffs. The second question is,—whether the damage complained of was caused solely by an act of God and in no way contributed to by the act of the defendants in the construction of the flume. These two questions are somewhat interwoven; for if the bulkheads or structures of the defendants contributed to or caused the damage, then such structures would be the proximate cause of the damage. If, however, an act of God was the cause of the damage and not aided by the act of the defendants in the construction of the flume or bulkheads as alleged by the plaintiffs, the defendants would not be liable. If the construction of the bulkheads by the defendants caused or contributed to the destruction of the property of the plaintiffs, then the defendants are liable. If it was due solely to the extraordinary rainfall, unaffected and uninfluenced in any way by the structures put along said stream by the defendants, then the defendants are not actionable.

"Now, gentlemen, all acts of negligence are not

actionable. While it is a canon of the law that a man should so use his own as not to injure another, yet to render an injury actionable for negligence, the injury resulting from the act must be because of a lack of ordinary care. An injury that is the natural consequence of an act of negligence is actionable; but an injury which could not have been foreseen, nor reasonably anticipated as the probable result of the act, in the light of attending circumstances, is not actionable. To constitute proximate cause, creating liability for negligence, the injury must have been the natural and probable result of the act, and the result should be one which, in the light of attending circumstances an ordinarily prudent man might reasonably have foreseen. An injury that is a natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury; but an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence, is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence but which could not have been foreseen or reasonably anticipated as to its probable consequences and which would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. A natural consequence of an act is a consequence which ordinarily follows from it, the result of which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. Therefore, in the cause before you, if you find from the evidence that the construction of the bulkhead or flume, as constructed, contributed

to or caused the damage complained of by the plaintiffs, and such resulting injury could not have been reasonably anticipated or foreseen, in view of all the attending circumstances, then you will find for the defendants. But, if you should find from the evidence that the damage could have been reasonably anticipated or foreseen from the construction of the bulkhead or flume, then the defendants are liable, and your verdict should be for the plaintiffs."

VIII.

The Court erred in instructing the jury as follows:

"A person obstructing or diverting a natural water-course from its natural channel by the erection of bulkheads, dams or other structures, is not required to build in anticipation of, or in preparation for, floods or freshets which are not only extraordinary, but unprecedented and cannot really be foreseen, such floods being, in contemplation of law, an act of God. An act of God is an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of care which a reasonable man would exercise under like conditions, and without any fault attributable to the parties sought to be held responsible. An extraordinary or unprecedented flood may be an act of God, but not an ordinary flood, or one that, in view of the conditions at the time, may occasionally occur, even though it occur at irregular intervals. It is clear that a rainfall causing a flood may be more than ordinary; yet, if it be such as has occasionally occurred, although it may be at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordi-

nary diligence in investigating the character and habits of the stream in which it occurs, reasonably have been anticipated.

"An extraordinary flood, to constitute what would be an act of God, relieving a person from all liability, is one of those unexplained visitations whose comings are not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight."

IX.

The Court erred in instructing the jury as follows:

"The defendants, in the case at bar, claim that the damage to the plaintiffs' house and lot was occasioned by such an extraordinary flood; that is, that a flood whose coming was not foreshadowed by the usual course of nature and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight. It is for you gentlemen of the jury to determine whether the flood of September 26, 1918, was of such character, or whether it might, by the exercise of ordinary diligence in investigating the character and habits of the stream, reasonably have been anticipated." (Rec. 395-405.)

Argument.

There are two controlling questions raised by these assignments. First: the error of the Court in submitting to the jury the defence of the Act of God; and Second: the refusal to instruct the jury to find for the plaintiffs. We will consider them in this order:

FIRST: The Defence of the Act of God. (Assignments II, VII, VIII and IX.)

In the opinion in this case 266 Fed. 821, it was said:

"There is no evidence in the present case that the flood of September 26th, 1918, was of such a character that it should not have been anticipated in the exercise of reasonable care and prudence." (p. 823.) And again: "The flood in the present case was not an 'unexplainable visitation.' It was caused by no cloud-burst or other catastrophic phenomenon, so as to be classed as an Act of God. It was caused solely by a heavy downfall of rain at a time when heavy rains were to be expected." (Bottom pp. 823-824.)

The evidence as to the character and extent of the flood was practically the same on the last trial as on the former, concerning which the above language was used. Although the defendants called other and additional witnesses on this point their testimony was the same as that of the witnesses examined on the first trial, and only confirmed what this Court had already decided. A reference to the testimony will make this perfectly clear.

Canfield's testimony is identical with that given on the former trial, being read from the record by stipulation. (Rec. pp. 354-8.) He was the government agent in charge of collecting data on stream flow. His instruments set in Gold Creek in the Canyon a short distance above the Cosey-Shattuck addition showed a maximum flow at the peak of the flood of 2600 cubic feet per second, and a total rise of the stream of 6.81 feet. (p. 355.) The other witnesses on this point,—the character and extent of the flood waters,—were Geo. T. Jackson, Allen Shattuck, Chas. Goldstein, W. Layton, Susie Michaelson, Mrs. Johnson, W. W. Casey, R. G. Day, H. T. Tripp, E. Gastoguy, Geo. Oswell, Geo. R. Dull, John Reck, B. M. Behrends, M. B. Summers, J. C. McBride, H. J. Lucas, L. V. Winter, J. C. Hayes and Gust Anderson. These all testified on the former trial, except Gold-

stein, Michaelson, Mrs. Johnson, R. G. Day, Geo. R. Dull, John Reck, J. C. McBride, H. J. Lucas, L. V. Winter and Gust Anderson. But the testimony of these ten merely showed the *same facts* as testified to by the other witnesses both on the former trial and on this, namely, that there was a heavy rainfall, beginning early in the morning; the creek began rising about 8 a. m., reached its peak about 1 p. m., and then gradually subsided. There was not a word in the evidence of any one of them tending to show facts that would raise the issue of an Act of God.

Mr. Goldstein is a merchant of long residence in Juneau, called by the defendants (Rec. p. 179), having testified that he was out on the flats on Sept. 26, 1918, was asked:

"Q. You observed the conditions out there that day?

A. Yes, to a certain extent.

Q. Now, did you observe the rainfall that day?

A. Yes.

Q. From your observations, had you ever experienced a greater rainfall in Juneau than there was that day?

A. I don't think so.

Q. How did that compare with any other period, any other day of heavy rain within your memory?

A. Well, that I couldn't say. I know there was a very heavy rainfall.

Q. Was it greater than any other period?

A. I couldn't say that either.

Q. Did you observe the flood waters in the creek that day?

A. I did.

Q. Did you ever see anything as high as that before?

A. No, sir." (Rec. p. 180.)

On cross-examination the witness stated he had never before seen the creek in high water since the construction of the flume (180-1). He therefore could not compare it with the flood and high water of October, 1913, which A. Eikland (Rec. pp. 46 and 58-9) had testified raised the creek as high if not higher than the flood of 1918. Indeed, so far as his testimony showed, the flood of Sept. 26, 1918, was the only high water Goldstein had ever noticed, which was natural, as that was the first high water after the settlement of the flats, when damage could have been done to property.

Mrs. Michaelson was an Indian woman who had to testify through an interpreter. (Rec. pp. 190-6.) She had never seen the water as high in Gold Creek as on September 26th, 1918. But she also said (p. 196) that she had never before seen Gold Creek except when the water was running in the main channel. If this was true, the high water of September 26th was the only one she ever saw. She also said she couldn't remember how many times she had seen high water—"It never entered my mind." (195.)

Mrs. Johnson was also an Indian woman, who testified through an interpreter (Rec. 196). She was not in Juneau on September 26, 1918, and gave no testimony on this point.

R. G. Day had only been in Juneau since 1912. He testified that the flood of Sept. 26th, 1918, was the highest he ever saw in Gold Creek. But on cross-examination it developed that he was not in Juneau in October 1913, and so missed seeing the only other high water that had occurred since his arrival, except the comparatively small one of 1915. (Rec. 266.)

Geo. R. Dull (Rec. 298) had lived in Juneau over 25 years; placer mined on Gold Creek one summer, and had charge of the Juneau City Water Works for

some six years. He had never seen as heavy a rainfall or as high water as there was on Sept. 26th, 1918. On cross-examination the witness stated he had never had any particular occasion to observe the height of the flood waters except when working for the Water Company. He didn't particularly recall the flood of 1913, and didn't have that in mind when he stated that the flood of 1918 was the highest. Didn't remember seeing any high water then. (305.)

John Reck (Rec. 305) is a banker and butcher of 24 years residence in Juneau. The flood of Sept. 26th was the highest water he ever saw in Gold Creek. On cross-examination he said he did not recall all the times of high water he had seen, and he had been absent at times and he didn't know about the high water that might have occurred in his absence.

J. C. McBride (Rec. 324), Collector of Customs, has lived in Juneau since 1904. Observed the weather conditions and flood waters on Sept. 26th, 1918. It was the largest rainfall and highest water he had ever observed since being here. On cross-examination he said he had perhaps observed high water half a dozen times. He simply didn't recall any flood waters as high as on Sept. 26, 1918, but didn't recall seeing the high water of 1913 or 1915. He was simply using as a basis of comparison the fact that Gold Creek bridge was taken out, and he assumed it was carried out by high water, and not by having its abutments undermined.

H. J. Lucas (Rec. 329) had lived in Juneau over ten years; went out to the flats on Sept. 26th, 1918, in response to a fire alarm call, he being a member of the fire department, being asked:

" Q. Within your residence in Juneau have you ever seen as high a period of water?

A. I don't believe I ever have."

On cross-examination he said he came here in 1912 and did not go out to Gold Creek or observe the flood therein that occurred in Oct. 1913. There were no houses on the flats then.

L. V. Winter (Rec. p. 338) had lived in Juneau 22-1/2 years. Was not in Juneau on Sept. 26th, 1918, and gave no testimony as to the flood, but testified to certain slides that occurred carrying some houses on Swede Hill.

Gust Anderson (Rec. pp. 364-8) gave no testimony on this question, but merely testified to the shifting nature of the channel of Gold Creek across the delta, as he had observed it for many years.

These were all the new witnesses called, and we have gone through their testimony at some length to show that there was nothing to justify the Court below in disregarding the law of the case as laid down by this Court on the former Writ of Error. In that decision (266 Fed. p 823), this Court referred to the testimony of "Coggins, who had lived in Juneau 23 years, when asked whether he had ever seen freshets as high as that of 1918, answered, 'I could not say whether I did or not.' He testified further, he had seen other freshets and could not say whether they were as high as that of 1918. 'They might have been higher for all that I know.' Layton was asked whether within his memory of 30 years he had seen as great a rainfall, or as high water as on Sept. 26th, 1918. He answered: 'No, I don't think so.' Behrends, who had been 32 years at Juneau, said he thought the flood was the highest he had ever seen, he would not undertake to say positively that it was. The defendants are bound by this testimony which they themselves introduced. It is wholly insufficient to show that the flood was of an extent and character which the defendants were not bound to anticipate."

This language is fully as applicable to the present record as it was to the former. Take for instance the testimony of Goldstein: He had been in Juneau 37 years. When asked if he had ever experienced a greater rainfall than there was on Sept. 26th, 1918, answered: "I don't think so."

"Q. How did that compare with any other period, any other day of heavy rain within your memory?

A. Well, that I couldn't say. I know there was a very heavy rainfall.

Q. Was it greater than any other period?

A. That I couldn't say either." (Rec. p. 180.)

"The defendants are bound by this testimony which they themselves introduced. It is wholly insufficient to show that the flood was of an extent and character which the defendants were not bound to anticipate." (266 Fed. 823.)

It was therefore manifest error for the Court to refuse as it did, (Rec. 371) the prayer of the plaintiffs for an instruction eliminating the defence of the Act of God; and in submitting that defence to the jury as it did in the instructions complained of in Assignments VII, VIII and IX, all of which were duly excepted to. (Rec. 384, 388.)

SECOND: *The Court should have granted the prayer of the plaintiffs to instruct the jury to find a verdict for the plaintiffs.* (Assignment I, Rec. 370 and 395.)

The defence of the Act of God being eliminated, the sole question under this assignment is, whether there was any evidence under the defendants' denials, or lack of evidence on the part of the plaintiffs, to establish conclusively as matter of law, the liability of the defendants. In other words, it is our contention that the undisputed *facts in evidence* rendered

the defendants liable as matter of law. From the pleadings the following facts are admitted: That in 1913 the defendants were the owners of a certain tract of land situated in the westerly part of the town of Juneau, and covering the flats bordering on Gastineau Channel, at the mouth of Gold Creek, and extending on both sides of the creek, which they subdivided into lots and blocks, and placed upon the market as the Casey-Shattuck Addition. In 1913 defendants sold Lot 6 in Block 209 in said Addition to plaintiffs. Gold Creek flows from the mountain range east of Juneau into Gastineau Channel across the Casey-Shattuck Addition. There are periods of flood in the stream; the lot sold plaintiffs was situated on the southeast side of the stream on high ground, far above any danger of floods from said stream during periods of high water; that on September 26th, 1918, plaintiff's property was damaged by a flood in said stream.

From the evidence the following facts were established without dispute: that in 1914 and 1915 defendants, from a point a little above plaintiff's property, constructed a bulkheaded channel, five feet deep and 30 feet wide, through the greater part of its course, but narrowing to 25 feet where it emptied into the sea. This bulkheaded, or artificial channel cut off the waters of the Creek from its main natural channel, and changed the course of the stream, and confined its waters in time of flood so they could not flow unimpeded through and across the delta and escape to the sea, as they did when the channel was in its natural condition. The bulkheads which confined the new channel were constructed of long logs, drift bolted together, and filled in behind with rock and sand. There were three eye-witnesses, two of them wholly disinterested, who described exactly how

plaintiffs' property was destroyed, namely: A. Eikland, E. R. Smith and C. W. Stearns. They all agree on the essential facts, that the waters of the Creek began rising early on the morning of September 26, 1918, that the bulkhead across the main channel of the Creek, just opposite and below plaintiff's property, held, and prevented the escape of the water down said channel; the water continued to rise, reaching its peak, (shown by the defendants to have been a total rise of 6.81 feet) about 2 p. m. Sometime about noon the bulkhead on the westerly side, that is across the stream from plaintiff's home, was washed out and some of the heavy logs of which it was built washed into the channel, became jammed, and forming a sort of wing-dam, diverted the force of the current to the easterly bank. These logs were still in the channel after the flood subsided, and are plainly shown in plaintiff's Exhibit D. Shortly after this occurred, the diverted current washed out the bulkhead on the easterly side of the Creek, and rapidly undercut and washed out the earth composing the high banks of the stream, until it reached and undermined and washed away plaintiff's property. *At no time did the water rise as high as the surface of plaintiff's lot. The destruction was caused solely by the diversion of the confined waters by the bulkheads against the property.* Not only is there no dispute as to these facts, *but the record shows that two of the defendants, W. W. Casey and Allen Shattuck, were themselves on the ground at the time, and neither of them denied the truth or accuracy of the facts testified to by Eikland, Smith and Stearns as to how the property was destroyed.* The trial court then should, upon proper request have treated these facts as established, and being established the defendants

were liable as matter of law. Under these facts no questions of negligence or want of negligence were involved. It was simply a case where the defendants, for their own purposes, had wilfully diverted the waters of a natural stream, so that they flowed upon the property of their neighbor and destroyed it.

This Court in 266 Fed. 823, quoting from the case of Hartshorn vs. Chaddock, 135 N. Y. 116, said: "Irrespective of any question of negligence or malice, a riparian owner, who by his wilful act diverts the waters of a stream from its accustomed channel, and causes them to flow upon the lands of his neighbor is liable for the resulting damages."

And your honors further said: "Answering the contention that the flood in question 'was so extraordinary and unusual as to be deemed an Act of God' the Court said: 'It is found that though the freshet was unusual, with respect to the volume of water, yet that similar ones, but of less power, have occurred in the past, and are likely to occur in the future'."

We respectfully but earnestly submit, then, that the request for the peremptory instruction should have been granted; that the lower court erred in refusing it, and in submitting to the jury in lieu thereof the question of the defendants negligence, or want of negligence as the sole criterion of the liability. For the lower court plainly told the jury (Rec. 381) that "The foundation for this action is the alleged negligence of the defendants in the construction of a so-called flume and series of bulkheads," etc.

Assignments III, IV, V, and VI.

The instructions quoted in these Assignments relate to the same error; they were each duly requested (Rec. 372-375) and the refusal excepted to. These instructions present in varying aspects the question decided by this Court on the former Writ of Error,

which may be broadly stated as follows: One who for his own purposes diverts the waters of a stream from the natural channel or confines them in artificial banks, so as to thereby damage the property of another, is liable for such damages. No question of negligence need be, or is involved, unless it be said that the diversion itself, in such way that the stream is not as safe as before, is negligence. This rule is not only in accord with common sense, and natural justice, but as this Court pointed out, is sustained by abundant authority, and the better reason. At any rate it was "the law of the case" for the Court below. But that Court not only denied the requests for the instructions, but nowhere in the instructions given was any attention paid, apparently, to the decision of this Court.

We respectfully submit that the judgment below should be reversed, and remanded, with instructions to the Court below, that upon another trial if the evidence is substantially the same, the jury be instructed to return a verdict for the plaintiffs.

J. H. COBB,
Attorney for Plaintiffs in Error.